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No. 87-1825

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

WASTE MANAGEMENT OF WISCONSIN, INC.,
a domestic corporation,

Petitioner,

v.

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES,

Respondent.

REPLY BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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I. THE ISSUES PRESENTED BY WASTE MANAGEMENT ARE COMPELLING.

The Wisconsin Court of Appeals has held that there is no process due when the Wisconsin Department of Natural Resources ("WDNR"), after making statutorily required findings of fact, orders Waste Management of Wisconsin, Inc. ("Waste Management"), to change its business operation and compels Waste Management to expend funds to comply with the changes ordered by the WDNR. This holding directly conflicts with the Court's prior decisions in *Cleveland Board of Education* v. *Loudermill*, 470 U.S. 532 (1985) and *Ex parte Young*, 209 U.S. 123 (1908).

The Wisconsin Court of Appeals' decision in this case conflicts with *Cleveland Board of Education* v. *Loudermill*,

470 U.S. 532 (1985) because the Wisconsin Court of Appeals held that the WDNR may condition the granting of a license to Waste Management upon the WDNR's reserving the power to order Waste Management to expend funds and to change its licensed business operation without providing any notice or hearing; and (2) the Wisconsin Court of Appeals' decision in this case conflicts with *Ex parte Young*, 209 U.S. 123 (1908) because the WDNR has been granted the power to compel Waste Management either to comply with the Modification or risk substantial monetary penalties and possible license revocation without providing Waste Management with any opportunity to challenge the merits of the Modification in a fact finding proceeding.

The respondent's assertion at p. 18 of its brief that *Ex parte Young* does not apply because "petitioner is not subjected to prosecution for noncompliance as the sole means of challenging the plan modification" is constitutionally irrelevant. The Modification is a final, enforceable decision. Waste Management was not afforded an opportunity to challenge the Modification on the merits in a fact finding proceeding. Waste Management will not be allowed to challenge the Modification on the merits in any subsequent WDNR enforcement action, however denominated. This result is entirely contrary to *Ex parte Young*.

Contrary to respondent's assertion's at pp. 9-11 of its brief, the issue in this case was not resolved by the Wisconsin Supreme Court in *Waste Management of Wisconsin, Inc. v. Wisconsin Department of Natural Resources*, 128 Wis. 2d 59, 381 N.W.2d 318 (1986), nor is it fact-specific. The respondent misstates the Wisconsin Supreme Court's holding in the 1986 *Waste Management* case to be that "the procedures generally used by the respondent, coupled with subsequent judicial review, satisfied due process requirements." (Resp. Br., p. 11 n.4) Nowhere in that decision does the Wisconsin Supreme Court come close to such a holding. The court held that that Modification impaired Waste Management's property interests and that the type of

hearing provided in that case satisfied the requirements of due process, if supplemented by judicial review. *Id.* at 80. Here, the Wisconsin Court of Appeals held that the Modification did not impair any property interest and that Waste Management was not entitled to any notice or hearing.

II. THE ISSUES ARE PROPERLY BEFORE THE COURT AND ARE NOT DE MINIMIS.

The issues presented in Waste Management's petition were presented to the Milwaukee County Circuit Court in the petitioner's petition for judicial review, the Wisconsin Court of Appeals in the petitioner's appellant's brief, and the Wisconsin Supreme Court in the petitioner's petition for review. Before each court, Waste Management asserted that its property interest in its license was deprived by the Modification.

The Modification is reprinted in the appendix to Waste Management's petition. (App., 14-32) The Modification orders Waste Management to proceed with plans to construct a leachate collection system (App., 21), institute an expanded groundwater monitoring program (App., 25-27), collect data, and prepare and submit additional reports on the operation of the Muskego Site. (App., 29-31) The WDNR's attempt to characterize the requirements of the Modification as minimal and thus not a deprivation of Waste Management's property interest is contrary to the actual requirements contained therein. The Modification plainly requires Waste Management to change its business operation at the Muskego Site and it requires Waste Management to expend funds in order to comply with the terms of the Modification.

III. THE WISCONSIN DEPARTMENT OF NATURAL RESOURCES REFUSES TO RECOGNIZE THE PROCESS DUE IN ADJUDICATORY PROCEEDINGS.

The WDNR attempts to obfuscate the issue in this case by ignoring the fundamental distinction that exists between administrative proceedings for the purpose of promulgating

rules and proceedings designed to adjudicate disputed facts in particular cases. In adjudicatory proceedings, due process requires notice and a hearing. *See, e.g., Morgan* v. *United States*, 304 U.S. 1, 14-15, *reh'g denied*, 304 U.S. 1 (1938). There can be no dispute that the action of the WDNR in issuing the Modification in this case is adjudicatory as the WDNR is required by statute to make specific factual determinations before issuing the Modification. *See id.* (*See also* Petition, pp. 10-13.) The Modification is directed to and only affects Waste Management. Due process requires notice and a hearing.

As support for its position that the WDNR may order Waste Management to expend funds and change its licensed business operation without providing any notice or a hearing, the WDNR cites cases which are simply inapplicable to this case. All of the cases relied upon by the respondent are either rule-making cases or adjudication cases where notice and a hearing were actually provided. (*See* Resp. Br., pp. 14-15.)

The respondent relies principally upon *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). (Resp. Br., p. 14.) That case does not authorize denial of notice and a hearing in administrative adjudicatory matters. The *Usery* case involved a challenge to the constitutionality of Title IV of the Federal Coal Mine Health & Safety Act of 1969, a Congressional enactment applicable to all. In the present case, the WDNR issued an adjudicatory order to one particular person.

The 1948 federal district court case and the Wisconsin cases cited by the respondent are also wholly inapposite and do not authorize the denial of notice and a hearing to Waste Management. *LeClair* v. *Swift*, 76 F. Supp. 729 (E.D. Wis. 1948), involved a conflict of law question between federal and Wisconsin statutes concerning fishing rights. *Chicago, Milwaukee, St. Paul & Pacific Railroad Company* v. *Public Service Commission*, 260 Wis. 212, 50 N.W.2d 416 (1951), involved a challenge to an adjudicatory order of the Public

Service Commission issued to the railroad *after* the railroad was afforded notice and a hearing on the matter. *Olson* v. *State Conservation Commission*, 235 Wis. 473, 293 N.W. 262 (1940), involved a challenge to a general administrative order, legislative in nature, which applied equally to all commercial fishermen. The WDNR has cited no cases which authorize a state agency, after making specific findings of fact without providing notice and a hearing, to order one particular licensed business to change its business operation and expend funds.

IV. THIS ACTION IS NOT MOOT

The WDNR's argument that the action is moot is without merit. Obviously, after the 90 day period expired within which Waste Management was ordered to comply with the terms of the Modification, Waste Management was (1) in total violation, (2) in partial violation, or (3) in compliance with the Modification. None of these circumstances renders the case moot. With respect to the first two possibilities, the WDNR's failure to date to enforce the Modification pending the resolution of this case does not render the action moot. *See Reeves, Inc.* v. *Stake*, 447 U.S. 429, 434 n.5 (1980) (enforcement of challenged state preferential policy discontinued but might recur so case not moot); *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 101 (1983) (temporary moratorium on use of challenged police practice did not moot case). Waste Management's compliance pending a resolution of this action does not moot the action. *See Allee* v. *Medrano*, 416 U.S. 802, 809-11 (1974). There is no indication that respondent concedes in urging mootness that the Modification was in error and can be disregarded by the petitioner. *Cf. Firefighters Local Union No. 1784* v. *Stotts*, 467 U.S. 561, 569 (1984). To the contrary, the respondent continues to defend the Modification and requires compliance. The respondent's mootness argument exacerbates the dilemma condemned in *Ex parte Young*. Waste Management cannot be placed in the untenable position of only being allowed to

test the constitutionality of a Modification in an enforcement action.*

In addition, even if Waste Management was not subjected to enforcement upon the expiration of the 90 days set forth in the Modification, the WDNR admits that continued regulation through the use of Modifications without providing notice and a hearing is likely to recur. (*See* Resp. Br., p. 21.) For this reason as well, this action is not moot. *See First National Bank* v. *Bellotti*, 435 U.S. 765, 774, *reh'g denied*, 438 U.S. 907 (1978) (case does not become moot when the challenged action is too short to be fully litigated prior to its cessation and there is a reasonable expectation that the complaining party will be subjected to the same action again).

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*It is curious that the WDNR's mootness argument arises for the first time in its brief in opposition to the petition for certiorari. Previously, the WDNR urged that total compliance with the Modification was required.

CONCLUSION

On the basis of the original petition and this reply, the petitioner respectfully requests that the Court grant its Petition for a Writ of Certiorari to the Court of Appeals of Wisconsin, District I.

Respectfully submitted,

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